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563-825—74——1

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

PETER J. BRENNAN, SECRETARY OF LABOR, PETITIONER

v.

GREYHOUND LINES, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–13A)[1] is reported at 499 F. 2d 859. The opinion of the district court (App. D, *infra*, pp. 16A–34A) is reported at 354 F. Supp. 230.

[1] "App." refers to the appendix to this petition. "Pltf's App.," "Dft's App.," "Tr." and "Exh." refer to portions of the record filed in the court of appeals, a copy of which we are lodging with the Clerk of this Court.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1974 (App. B, *infra*, p. 14A). A timely petition for rehearing was denied on July 25, 1974 (App. C, *infra*, p. 15A). On October 11, 1974, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to November 25, 1974. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Age Discrimination in Employment Act, an employer that defends its refusal to hire older applicants must prove that age is in fact a bona fide occupational qualification or merely that it had some rational basis for so believing.

2. Whether an employer establishes even a rational basis for its belief in the business necessity of its discriminatory policy merely by presenting unsubstantiated subjective testimony and inconclusive statistical evidence, when it has access to other data bearing more directly upon the relationship of that policy to the safety or efficacy of its operations and has neither offered that data nor explained its reasons for not doing so.

STATUTE INVOLVED

Section 4 of the Age Discrimination in Employment Act of 1967, 81 Stat. 603, 29 U.S.C. 623, in pertinent part provides:

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against

any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

* * * * *

(e) It shall be unlawful for an employer * * * to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer * * * indicating any preference, limitation, specification, or discrimination, based on age.

(f) It shall not be unlawful for an employer * * *—

(1) to take any action otherwise prohibited under subsections (a) * * * or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

STATEMENT

This action was brought in the United States District Court for the Northern District of Illinois by the Secretary of Labor to enjoin respondent from refusing to consider any application for employment as a bus driver from persons over the age of 35, and from publishing advertisements stating that age restriction, in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, *et seq.* Respondent denied that its

restrictive employment and advertising practices violated the Act, claiming that the maximum age limitation for new drivers is a "bona fide occupational qualification reasonably necessary to the normal operation of [its] business" within the meaning of Section 4(f)(1) of the Act. The question presented here concerns the kind and quantum of proof necessary to establish a "business necessity" defense to a charge of discrimination under the Act.

Respondent is the country's largest intercity bus carrier. It has 105,000 route miles within the continental United States and employs 9,500 bus drivers. Its restrictive hiring practices date back to the 1920's when it established a maximum hiring age limitation for all employees, including clerical and other employees whose work does not affect the safety of respondent's operations as a carrier (Pltf's App. 28–29; Tr. 473). Although respondent has now abolished most of its restrictive hiring practices, it continues to refuse to hire new drivers over the age of 35. This age restriction applies only to hiring, not to employment; at the time of trial 61 percent of respondent's drivers were over 40 (Pltf's Exh. 3–A, p. 3).

Respondent makes no claim that its older drivers are incapable of performing their duties safely; driving responsibilities are allocated without reference to age. Although as a result of the bidding and seniority procedures specified in respondent's collective bargaining agreement most new drivers are assigned to the "extra board"[2] whereas most senior

[2] Drivers assigned to the extra board have no scheduled routes or fixed hours of work. They perform such driving serv-

drivers have scheduled routes, many of respondent's older drivers work on the extra board (Tr. 185, 546, 1112, 1374, 1477).[3]

The heart of respondent's business necessity defense is that new older drivers, who would be assigned to the extra board under respondent's seniority system (see Tr. 1271, 1342–1343, 1352, 1377, 1388, 1425, 1427), would not perform those allegedly more arduous driving responsibilities safely. Respondent's witness Dr. Harold Brandaleone described generally the physiological and psychological changes which occur as a result of the aging process (Tr. 318–330; 338–339), but substantial evidence was introduced that showed that the aging process alone does not impair driving ability at ages under 70 (Tr. 700, 703–704, 707, 711–714, 733, 759, 809, 1819, 1822, 1824, 1826, 1834, 1845).[4]

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ices as are needed—*e.g.*, operating extra sections that must be added to the scheduled runs when there is a traffic overload (Tr. 95–96, 617–618; Pltf's Exh. 29, p. 36); handling charters, including cross-country trips, tours, and other special operations (Tr. 100, 504; Pltf's Exh. 29, pp. 35–36); substituting for sick or vacationing regular drivers (Pltf's Exh. 1, Admis. No. 32(a) pp. 88–89); and "deadheading" equipment from one point to another (Tr. 505).

[3] Respondent employs school teachers up to the age of 50 as summer drivers, and they also are assigned to the extra board (Pltf's App. 37–38; Pltf's Exh. 1, Admis. No. 33; Pltf's Exh. 29, pp. 102–103; Tr. 1186). In addition, respondent regularly uses drivers from affiliated and nonaffiliated bus companies that have no maximum age limitation on the employment of new drivers (Tr. 162–163, 1119, 1128, 1471–1473, 1590; Pltf's Exh. 1, Admis. Nos. 9, 15, 16; Pltf's Exhs. 3A, pp. 1–3, and 3B).

[4] Respondent employs highly sophisticated testing procedures for screening out physically or mentally unqualified applicants and for maintaining a constant check on the driving capacity

In addition to Dr. Brandaleone's testimony, respondent offered the opinion evidence of several persons employed in the bus industry, including its own officers and five of its drivers (only one of whom was over 45), that older drivers could not withstand the rigors of the extra board (Tr. 201, 249, 352–353, 650, 909–910, 927–928, 994, 1249, 1252–1253, 1308–1309, 1316, 1361, 1402, 1434)—although, as already indicated, respondent does in fact have many older drivers who are assigned to the extra board. Other drivers, who had been hired after age 40 by other intercity bus companies, testified that they regularly worked on extra boards and that on the basis of their own experience it was their opinion that such work is not

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of its incumbent drivers (Tr. 480, 738–740, 760–761, 1139, 1855–1856, 1913–1914). The preemployment procedures (which screen out 95 percent of all applicants) include a medical examination; a background investigation of, among other things, the applicant's driving record, criminal record (if any), financial responsibility and past employment record; and attendance at a four to six week driver training course during which time the student applicants are constantly checked, monitored and evaluated in both day- and night-driving (Tr. 480–481, 483–487, 1153, 1157; Pltf's App. 41–49; Pltf's Exh. 1, Admis. Nos. 25 and 26; Pltf's Exh. 19; Pltf's Exh. 29, pp. 76–78; Pltf's Exh. 30, pp. 43–44). Thereafter, respondent continuously monitors the performance and physical condition of its incumbent drivers (Tr. 200, 1292–1293, 1479; Pltf's Exh. 1, Admis. No. 28; Pltf's Exh. 29, pp. 85–87) so as to detect changes in personality or reaction time (Tr. 642–664, 1292–1293, 1319, 1665), ability to drive under different weather and visibility conditions (Tr. 1294), and fatigue (Tr. 351). Respondent's drivers are also given periodic medical examinations that satisfy standards set by the Department of Transportation (Pltf's Exh. 1, Admis. No. 28; Pltf's Exh. 6, p. 1; Pltf's Exh. 7; Pltf's Exh. 29, p. 84).

too rigorous for older workers (Tr. 1580–1581, 1584–1590, 1592–1594, 1639–1644, 1662–1663, 1673–1674, 1695–1697, 1703). Evidence was also introduced that although extra-board drivers have no fixed hours of work and are subject to call seven days a week, they do not work longer hours or drive more miles than regular-run drivers (Tr. 1177–1178; Dft's Exh. 5);[5] under the terms of respondent's collective bargaining agreement, extra-board drivers are off duty for at least one 24-hour period each week (Dft's App. 25; Tr. 1354); and although such drivers are subject to call at odd hours, respondent requires that its drivers be well rested (Tr. 187) and drive no more than 10 hours, or be on duty (including driving) for no more than 15 hours, in any 24-hour period (Dft's App. 34).[6]

Respondent also offered five statistical exhibits relating to the age, experience and safety records of its drivers. Three of these (Dft's Exhs. 4, 5, and 6) compare the accident rates of respondent's extra-board drivers with those of its regular-run drivers, and show that the extra-board drivers have more than twice as many accidents per million miles driven as do the

[5] Even during respondent's busiest weeks, the hours of the extra board drivers—which, unlike those of other drivers, include considerable standby time—are comparable to those worked by the regular-run drivers (Tr. 533–539, 1026–1033, 1271–1281; Dft's Exh. 1). The average monthly mileage of respondent's regular-run drivers is double that of the extra-board drivers (Dft's Exh. 5).

[6] In addition, federal regulations require a daily rest period of at least eight consecutive hours (49 C.F.R. 395.3(a); Pltf's Exhs. 4 and 5-A).

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regular-run drivers. A fourth exhibit (Dft's Exh. 8), which compared drivers' accident rates on the basis of years of driving experience with respondent, shows that the accident rates of drivers with less than five years' experience are more than 2½ times those of drivers with 15 or more years' experience. A fifth exhibit (Dft's Exh. 7), comparing the accident rates of respondent's drivers by age, shows that the accident rate of drivers between the ages of 24 and 40 is more than double that of drivers between the ages of 40 and 65.[7]

Respondent did not offer any evidence comparing the accident rates of extra-board drivers over the age of 40 with those of other drivers in the same age group or with younger extra-board drivers.[8] Nor did respondent introduce any evidence comparing the accident rates of its drivers, at different levels of experience, with those of other intercity bus drivers.

The district court concluded that (App. D, *infra*, p. 34A):

> * * * [T]he data prepared by [respondent] and the evidence it has presented has not met the burden of demonstrating that its policy of age

[7] The accident rate of drivers between the ages of 56 and 60 was shown to be slightly higher than that of drivers between the ages of 40 and 55 but substantially lower than that of drivers under the age of 40. The increase after age 55 is, however, too small to be statistically significant (Tr. 1754–1755).

[8] The Secretary introduced a number of other statistical studies and investigations that show that older bus drivers have fewer accidents than younger ones, even working under identical conditions and with the same number of years' experience (Pltf's Exh. 60, Pltf's App. 50–55; Tr. 1852–1853, 1946–1949).

limitation is reasonably necessary to the normal and safe operation of its business nor that age is a bona fide occupational qualification within the meaning of the Act.

The court of appeals reversed. The court first held that the standard of proof imposed upon respondent by the district court was too high. Rather than requiring a defendant employer, in a case such as this, to demonstrate that its policy of age discrimination was in fact reasonably necessary to normal and safe operations, the court of appeals held that it was sufficient for the employer merely to "demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers" (App. A, *infra*, p. 7A). Applying that standard to the evidence presented by respondent, the court concluded that respondent's "maximum hiring age policy is founded upon a good faith judgment concerning the safety needs of its passengers and others" (App. A, *infra*, p. 13A).

REASONS FOR GRANTING THE WRIT

1. The standard of proof applied by the court of appeals—that an employer may justify employment discrimination based on age merely by showing that it has a rational basis for believing that age is a bona fide occupational qualification, without showing that age is in fact such a qualification—seriously and erroneously limits the effectiveness of the Age Discrimination in Employment Act in eliminating improper age discrimination in employment. The court's

rejection of a more rigorous standard conflicts with the decision of the Fifth Circuit in *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, under the similar provisions of Title VII of the 1964 Civil Rights Act. Moreover, as the court of appeals' application of the weaker standard in this case shows, that standard frequently would permit age discrimination to be justified as safety-related on nothing more than an employer's ~~"rational basis in fact to believe" that~~ subjective judgment concerning the performance of older workers where that judgment is not supported by hard facts or unequivocal empirical studies.

The provision in the Act permitting age discrimination "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (Section 4(f)(1)) requires something more than an employer's "rational basis in fact to believe" that the age discrimination is necessary to avoid "risk of harm to its passengers." The proper test is the one the district court applied: that the employer must demonstrate by objective evidence and data that "its policy of age limitation is reasonably necessary to the normal and safe operation of its business" (App. D, *infra*, p. 34A). The employer does not establish the statutory justification by presenting, as it did in this case, general opinion evidence and statistics showing that the safety record of the older workers against whom it discriminates is either better, or at least no worse, than that of the younger employees it prefers.

2. Even if, contrary to our submission, the court of appeals enunciated the correct standard, the approach

followed by the court of appeals in evaluating the evidence on the question whether age is a bona fide occupational qualifiation reasonably necessary to the normal operation of respondent's business will, if generally followed by the lower federal courts, seriously weaken the effectiveness of the Act in eliminating age discrimination in employment.

The court below stated that where, as here, safety considerations are at issue, an employer carries his burden of showing a business necessity for age discrimination by establishing that it has a sound rational basis for believing that elimination of its discriminatory practices would increase the risk of harm to its customers and the general public. But, for reasons that we now discuss, this should require the employer to produce evidence in its possession, or reasonably available to it, which most directly bears upon the pertinent relationships of age to safety, and which unequivocally supports the employer's claim.

The defense of business necessity is one with respect to which the crucial facts frequently are most readily accessible to the defendant employer. In this case, for example, respondent either possessed, or had reasonably available to it, data from which statistical comparisons of the accident rates of older and younger extra-board drivers, and of older extra-board and regular-run drivers, could be developed. Such statistical comparisons would have been helpful in testing whether respondent's belief that hiring new older extra-board drivers would increase its overall accident rate was in fact rationally based. Similarly, a statistical comparison of the accident rates of respondent's

drivers with those of other intercity bus drivers of comparable experience would have borne upon the rationality of respondent's assumption that the hiring of older drivers with long experience with other bus companies would adversely affect its safety record.

Respondent's failure to produce such evidence gives rise to one of two adverse inferences, either of which defeats respondent's claim of business necessity: either respondent was in fact unaware of what such statistical comparisons would show, in which case its discriminatory hiring policy is evidently based upon subjective considerations not rooted in hard fact; or respondent was aware that such comparisons would not support its claim. "The production of weak evidence when strong [evidence] is available can lead only to the conclusion that the strong would have been adverse" (*Interstate Circuit* v. *United States*, 306 U.S. 208, 226).

The court of appeals, however, upheld the claim of business necessity without requiring the submission of such evidence. The court permitted respondent to rest upon equivocal statistical evidence—the most reasonable inference from which was that the older drivers against whom respondent discriminates are safer than the younger drivers it hires—and upon unsubstantiated subjective statements concerning the allegedly disqualifying effects of age. The paradoxical consequence of the court's decision is that it allows the very prejudices that underlie age discrimination in employment to be asserted as acceptable reasons for continuing such discrimination; that approach is

fundamentally disruptive of the Secretary's efforts to enforce a legislative program designed to overcome those prejudices and eliminate job discrimination on the basis of age.

3. This case will have an immediate and major impact upon enforcement of the Act in the intercity bus transportation industry. Respondent employs over half the 16,000 drivers in that industry; and other large bus companies follow similar discriminatory hiring policies. See, *e.g., Hodgson* v. *Tamiami Trail Tours, Inc.*, 4 FEP Cases 728 (S.D. Fla.), appeal pending, No. 72-2373 (C.A. 5). The effect of the decision below, both as ruling and precedent, will be to foreclose employment opportunities not only for older applicants who have never worked as intercity bus drivers but also for those who have spent their entire working lives in that occupation and have left their prior employment due to shutdowns, layoffs, or for other reasons. Furthermore, the decision carries serious implications for older workers in other occupations that involve in some manner the safety of customers or the public, including, merely as examples, drivers, operators, and pilots of all kinds, fire fighters, and law enforcement personnel.

The purpose of the Act, as stated in Section 2(b), is "to promote the employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination" for new employment. The decision below directly frustrates that purpose and should be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
KEITH A. JONES,
Assistant to the Solicitor General.

WILLIAM J. KILBERG,
Solicitor,
CARIN ANN CLAUSS,
Associate Solicitor,
SYLVIA S. ELLISON,
JAMES B. LEONARD,
Attorneys,
Department of Labor.

NOVEMBER 1974.

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

No. 73-1214

September Term, 1973—January Session, 1974

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLEE

v.

GREYHOUND LINES, INC., DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 69 C 2227

JAMES B. PARSONS, *Judge.*

Argued January 18, 1974—Decided April 23, 1974

Before SWYGERT, *Chief Judge,* PELL, *Circuit Judge,* and ESCHBACH, *District Judge.*[1]

SWYGERT, *Chief Judge.* Defendant-appellant, Greyhound Lines, Inc., appeals from a finding that its maximum hiring age policy for applicants for the position of driver of intercity passenger buses violates the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, *et seq.* Pursuant to that policy Grey-

[1] District Judge Jesse E. Eschbach of the Northern District of Indiana is sitting by designation.

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hound declines to consider applications for intercity bus drivers from those individuals thirty-five years of age or older.[2]

The Government contends that Greyhound's hiring policy violates section 4(a)(1) of the Act, 29 U.S.C. § 623(a)(1), which makes it unlawful "to fail or refuse to hire * * * any individual * * * because of such individual's age." In addition the Government charges that Greyhound's maximum hiring age violates section 4(a)(2) of the Act, 29 U.S.C. § 623(a)(2), which prohibits efforts "to limit, segregate, or classify * * * employees in any way which would deprive * * * any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." Also the Government claims that Greyhound's advertisements indicating age differentiation in employment is forbidden by section 4(e) of the Act, 29 U.S.C. § 623(e).

Greyhound, although admitting the employment and advertising practices charged by the Government, denies that such practices violate the Act in that it is contended that Greyhound's actions are exempted from the Act's proscriptions. Under Section 4(f)(1) of the Act, 29 U.S.C. § 623 (f) (1), an employer may differentiate as to age without violating the Act if age is shown to be a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business * * *." Greyhound contends that its maximum age hiring policy is premised on considerations of public safety and as such constitutes a "bona fide occupational qualification."

At trial Greyhound urged that abolition of its maximum age hiring policy with respect to intercity bus drivers would increase the likelihood of risk of harm

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[2] The Act prohibits age discrimination with respect to those persons age forty to sixty-five. 29 U.S.C. § 631.

due to driver failure and thereby concomitantly impede Greyhound's efforts for safety. The trial judge held that Greyhound had failed to meet its "burden of demonstrating that its policy of age limitation is reasonably necessary to the normal and safe operation of its business." In making this determination the trial judge stated:

> [T]he defendant's policy is not founded on the "factual basis" for its belief that "all or substantially all [applicants over age 40] * * * would be unable to perform safely and efficiently the duties of the job involved."

In appealing from this holding Greyhound presents two issues for our review. Greyhound contends: (1) that the district court imposed an improper burden of proof on it; and (2) that as a matter of law the evidence demonstrates that Greyhound's hiring policy is a bona fide occupational qualification reasonably necessary to the normal operation of its business. We agree.

I.

The standard for the burden of proof placed on Greyhound by the trial judge was taken from the Fifth Circuit's decision in *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (5th Cir. 1969). In that case the telephone company was faced with a charge of sex discrimination for refusing to consider the application of a woman for the position of switchman. As an affirmative defense the telephone company claimed that the sex of an applicant for the position of switchman was a bona fide occupational qualification because of the allegedly strenuous activity of lifting of weights in excess of thirty pounds occasionally required in fulfilling the job of switchman. In discussing the burden of proof cast upon the telephone company the court stated:

> [W]e hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. 408 F. 2d. at 235.

The court denied the telephone company a bona fide occupational qualification exemption, holding that the company had failed to meet its burden of proof. The court declined to indulge in an assumption, "on the basis of a 'stereotyped characterization' that few or no women can safely lift thirty pounds, while all men are treated as if they can." 408 F. 2d at 235, 236.

Although the standard for the burden of proof annunciated in *Weeks* may properly be applicable to the circumstances of that sex discrimination case, we find its application inappropriate in the instant action. Unlike *Weeks*, our concern goes beyond that of the welfare of the job applicant and must include consideration of the well-being and safety of bus passengers and other highway motorists. In fashioning the standard of proof in *Weeks*, the Fifth Circuit was not confronted with a situation where the lives of numerous persons are completely dependant on the capabilities of the job applicant. Accordingly, we find that decision is of no avail in formulating the standard of proof to be imposed in the instant case.

A more pertinent case is the Fifth Circuit's decision in *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (5th Cir. 1971). In *Diaz* Pan American airline was charged with a violation of the 1964 Civil Rights Act because of its refusal to hire male flight cabin attendants solely because of their sex. As an affirmative defense Pan American argued that being a female was a "bona fide occupational qualification"

for the position of flight cabin attendant. In an effort to carry its burden of proof, Pan American produced evidence demonstrating: that females were superior in performing the nonmechanical aspects of the job such as reassuring anxious passengers and providing personalized service; that passengers preferred female attendants (the basic psychological reasons for such preference); and that the actualities of the hiring process would make it more difficult to find those few males suitable to attend to the psychological needs of passengers.

In analyzing the standard of proof required of Pan American to establish a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," the Fifth Circuit construed the word "necessary" in the Act to require:

> [T]hat we apply a business *necessity* test, not a business *convenience* test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively. (Emphasis in original.) 442 F. 2d at 388.

The court proceeded to characterize the essence of the normal operation of an airline stating that: "The primary function of an airline is to transport passengers safely from one point to another." 442 F. 2d at 388. In the court's view Pan American could not establish that the employment of male cabin attendants would have any impact on its ability to provide safe transportation and accordingly the court rejected Pan American's defense of bona fide occupational qualification. Pan American's basis for excluding male applicants, that they could not cater to the psychological needs of the passengers as adequately as females, was

found to be merely "tangential to the essence of the business involved." 442 F. 2d at 388.

Similar to the airline industry, the essence of Greyhound's business is the safe transportation of its passengers. Thus we deem it necessary that Greyhound establish that the essence of its operations would be endangered by hiring drivers over forty years of age. To that end we note the decision in *Spurlock* v. *United Airlines, Inc.*, 475 F. 2d 216 (10th Cir. 1972), where, in addressing itself to the validity of preemployment job qualifications for the position of airline pilot alleged to discriminate against Blacks, the Tenth Circuit stated:

> When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related. *Cf.* 29 C.F.R. § 1607.5 (c)(2)(iii). The job of airline flight officer is clearly such a job. United's flight officers pilot aircraft worth as much as $20 million and transport as many as 300 passengers per flight. The risks involved in hiring an unqualified applicant are staggering. The public interest clearly lies in having the most highly qualified persons available to pilot airliners. The courts, therefore, should proceed with great caution before requiring an employer to lower his pre-employment standards for such a job. 475 F. 2d at 219.

As reflected in the *Spurlock* decision, a public transportation carrier, such as Greyhound, entrusted with the lives and well-being of passengers, must continually strive to employ the most highly qualified persons available for the position of intercity bus driver for the paramount goal of a bus carrier is safety. Due to such compelling concerns for safety, it is not necessary that Greyhound show that all or substantially all bus driver applicants over forty could not perform safely. Rather, to the extent that the elimination of Greyhound's hiring policy may impede the attainment of its goal of safety, it must be said that such action undermines the essence of Greyhound's operations. Stated differently, Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers. Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice.

II.

In an effort to satisfy its burden of proof, Greyhound produced an array of evidence to substantiate its claim for a bona fide occupational qualification. That evidence included testimony by transportation industry officials, former high-ranking officials of the Interstate Commerce Commission, and Greyhound officers. The testimony of these officials, although persuasive in view of their accumulated experience in the transportation industry, is not of itself sufficient to establish a bona fide occupational qualification. In our view we find more compelling Greyhound's evidence relating to: the rigors of the extraboard work assign-

ments; the degenerative physical and sensory changes in a human being brought on by the aging process which begins in the late thirties in the life of a person; and the statistical evidence reflecting, among other things, that Greyhound's safest driver is one who has sixteen to twenty years of driving experience with Greyhound and is between fifty and fifty-five years of age, an optimum blend of age and experience with Greyhound which could never be attained in hiring an applicant forty years of age or over. This compelling evidence in combination with the general testimony of the transportation industry officials adequately demonstrates that Greyhound has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to the well-being of its passengers and others.

At the outset we note that the thrust of Greyhound's contention and supporting evidence is that the human body undergoes physical and sensory changes beginning around age thirty-five and that these degenerative changes, caused by aging, have a detrimental impact on driving skills. Moreover, these changes are not detectable by a physical examination. The Government admits that these degenerative changes do occur, but contends that they do not affect driving skills because the driver between forty and sixty-five years of age compensates for these changes through increased maturity and driving experience. In addition the Government claims that even though a physical examination of applicants between forty and sixty-five might not detect degenerative changes impairing driving ability, any such infirmities will be detected during the course of the other elaborate functional and psychological examinations conducted by Greyhound in screening intercity driver applicants.

The medical testimony on behalf of the Government reflects the gravaman of the Government's challenge to Greyhound's hiring practice. According to the Government's medical witnesses an applicant forty to sixty-five years of age should be judged on the basis of his "functional age," that is, his ability and capacity to do the job, rather than his chronological age. When the testimony of the medical experts on both sides is considered, however, it is not clear that functional age is readily or practicably determinable. Moreover, the Government's medical witnesses seemingly admit that chronological age is at least an indicator of driving ability. Even assuming that Greyhound's examinations of driving skills other than the physical examination can adequately screen out degenerative disabilities occasioned by age in the forty to sixty-five age bracket, it is questionable whether Greyhound could practicably scrutinize the continued fitness of such drivers on a frequent and regular basis.

We come now to the nub of Greyhound's contention that its maximum hiring age policy is a bona fide occupational qualification reasonably necessary to mainstay the safety of its operations. Greyhound urges that the impact of the aging process will be magnified by the rigorous physical and mental demands of the extra-board work assignment system to which all new drivers between the ages of forty to sixty-five would be assigned under its seniority system. There are two work categories into which Greyhound bus drivers are classified. The first is the regular run driver who operates those schedules published in Greyhound's timetables. The regular runs are generally regarded by the drivers as more desirable and require the least strenuous work. These runs are bid by the drivers on the basis of a seniority system established in collective bargaining agreements. The

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remaining work is performed by the group of drivers referred to as extra-board drivers. A newly hired driver, regardless of age or prior experience, goes to the bottom of the seniority list where he is available for assignments from the extra-board. In general the new driver will remain on the extra-board for a period of ten to forty years depending upon the seniority list in the territory in which he is employed.

While on the extra-board the driver is on call twenty-four hours a day, seven days a week with as little as two hours' notice, to take runs that the more senior regular run drivers do not operate. Often these operations involve odd and irregular hours and, frequently, long charter trips outside the territory served by the regular routes of Greyhound, that may last up to thirty days.

At trial there was testimony to the effect that Greyhound's extra-board work is particularly physically and mentally demanding and that it places an unusual amount of emotional stress on the driver and is often disruptive of the driver's routine of living. One of the redeeming aspects of the operation of the extra-board and the seniority system, however, is that it rewards the driver by giving him an opportunity, as he grows older, to solicit the work that he feels he is best qualified to perform. In the earlier years of a driver's employment he is not able to do that for he must accept whatever work is not performed by the regular drivers. The seniority system is highly advantageous as presently constituted for it allows the older, more experienced driver to compensate for his aging by selecting the more attractively and easily performed work.

Greyhound contends that even though an applicant between age forty and sixty-five may satisfactorily perform on the driver qualification examinations so

that at the outset he would be entitled to employment, there is no way of telling how safely he will perform for a sustained period of time given the fact that he will be assigned to the arduous tasks involved on the extra-board at a time when his body begins to undergo degenerative changes due to the aging process. The statistical evidence produced by Greyhound lends support to its belief that elimination of the maximum hiring age will increase the risk of harm to its passengers. That evidence demonstrates that the rigors of the extra-board are such that extra-board drivers, even with the advantage of youth, experience twice as many accidents per million miles driven than that incurred by regular run drivers, namely, 9.79 accidents per million miles as compared with 4.3 accidents per million miles for regular run drivers. With respect to the effect of the aging process on the safety records of Greyhound's drivers, the statistical evidence establishes that despite the offsetting benefits derived through increased experience as a Greyhound driver, the driver accident rate begins to increase at age fifty-five. Likewise, the statistical evidence isolating driver experience illustrates that as a driver's experience with Greyhound increases his accident rate correspondingly decreases, but that this rate reverses and begins to increase after twenty-six years of experience concomitant with the period during which the aging process is operative. In addition, the statistical evidence establishes that Greyhound's safest driver is fifty-five years of age and has sixteen years of experience as a Greyhound driver—two qualities which newly hired drivers between ages forty and sixty-five would never be able to attain during their tenure at Greyhound.

Besides the foregoing statistical evidence, Greyhound directs our attention to a 1972 study sponsored by the Bureau of Motor Carrier Safety of the United

States Department of Transportation which supports certain of Greyhound's claims regarding the likely physical and mental capabilities of newly hired drivers age forty to sixty-five on the extra board. The study indicates that its testing results "are consistent with the hypothesis that older drivers become fatigued more quickly and consequently experience [a] greater proportion of accidents after prolonged driving than younger drivers." Similar to Greyhound's experience, the study showed that the percentage of accidents decreased substantially as the bus or truck driver's age increased from age thirty to the age group forty-one to forty-five but then generally increased from the forty-one to forty-five age group to fifty-six years of age. The study's accident analysis indicated that older drivers tend to experience proportionally more of their accidents after about five hours on the road than do younger drivers. The study summary concludes that the "adverse effects of prolonged driving were evidently more pronounced for older drivers (aged forty-five or more) than for younger drivers" and that "older drivers generally showed an earlier decline in psychophysiological arousal than the younger ones and dropped to a lower absolute level of arousal."

With respect to the evidence adduced by Greyhound the Government argues that it constitutes mere conjecture and generalized opinion testimony and is not objective data, demonstrating the inability of newly hired drivers between age forty and sixty-five to cope with the demands of the extra-board. The Government concurs in the district court's holding that Greyhound has failed to establish a "factual basis" for its position. We cannot agree. In our view Greyhound's position as to the potential increase of risk of harm which would be incurred by the elimination of its maximum hiring age is well-founded and grounded on

an adequate factual basis. Greyhound need not establish its belief to the certainty demanded by the Government and the district court for to do so would effectively require Greyhound to go so far as to experiment with the lives of passengers in order to produce statistical evidence pertaining to the capabilities of newly hired applicants forty to sixty-five years of age. Greyhound has amply demonstrated that its maximum hiring age policy is founded upon a good faith judgment concerning the safety needs of its passengers and others. It has established that its hiring policy is not the result of an arbitrary belief lacking in objective reason or rationale.

The judgment of this district court is reversed.

APPENDIX F

In the United States Court of Appeals for the Seventh Circuit

No. 73-1214

April 23, 1974

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLEE

v.

GREYHOUND LINES, INC., DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Before LUTHER M. SWYGERT, *Chief Judge*, WILBUR F. PELL, JR., *Circuit Judge*, JESSE E. ESCHBACH, *District Judge.**

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this day.

WILLIAM P. O'LOUGHLIN,
Deputy Clerk of the United States Court of Appeals for the Seventh Circuit.

*District Judge Jesse E. Eschbach of the Northern District of Indiana is sitting by designation.

APPENDIX C

In the United States Court of Appeals for the Seventh Circuit

No. 73-1214

July 25, 1974

JAMES D. HODGSON, SECRETARY OF LABOR,
PLAINTIFF-APPELLANT

v.

GREYHOUND LINES, INC., DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division (69 C 2227)

Before LUTHER M. SWYGERT, *Chief Judge*, WILBUR F. PELL, Jr., *Circuit Judge*, JESSE E. ESCHBACH, *District Judge.

On consideration of the petition for rehearing filed in the above-entitled cause,

It is hereby ordered that the petition for rehearing in the above-entitled appeal be, and the same is hereby, denied.

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*Hon. Jesse E. Eschbach, District Judge of the Northern District of Indiana is sitting by designation.

APPENDIX D

In the United States District Court for the Northern District of Illinois, Eastern Division

No. 69 C 2227

JAMES J. HODGSON, SECRETARY OF LABOR, PLAINTIFF

v.

GREYHOUND LINES, INC., DEFENDANT

MEMORANDUM OPINION AND ORDER

The proceedings upon which the following opinion is rendered are based upon a Complaint filed by the Secretary of Labor of the United States Department of Labor, requesting the restraining of alleged violations of Sections 4(a)(1), 4(a)(2) and 4(e) of the Age Discrimination in Employment Act of 1967 and for such further relief as is deemed appropriate, including the restraint of any further refusal by defendant to employ persons denied employment in the past because of their ages.

During the course of trial, I have had the benefit of the testimony of eminent witnesses, the arguments of counsel, written memoranda and a multitude of exhibits. This is a case of great moment and my decision has come only after deep deliberation and study.

The issue, herein, is whether defendant's policy of refusing to consider applications of individuals between the ages of 40 and 65 for initial employment as bus drivers is a bona fide occupational qualification reasonably necessary to the normal operation of its business. Section 4(f)(1) of the Act states as follows:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

The plaintiff alleges that the defendant has failed to meet its burden of proving that its age limitation policy for bus driver position is a bona fide occupational qualification reasonably necessary to the normal operation of its business.

The defendant has admitted that it does not consider applicants for the position of interstate bus drivers persons who are between the age of 40 to 65 years and contends that it is entitled to an exception because of Section (f)(1), *supra,* of the Act.

Defendant contends that if it were required to hire beginning interstate bus operators up to the age of 65 an unacceptable risk to the safety of its passengers and other members of the motoring public would ensue.

The defendant has offered the following arguments for its allegation.

> 1. The defendant is required by law and by the nature of its business to exercise the highest degree of care, not only in the operation of its buses but in the hiring of bus drivers.
>
> 2. Although individuals up to the age of 65 may be able to pass the required physical examination and be otherwise qualified, such physical examination is incapable of discovering the physical and sensory changes common to all man, [sic], caused by aging, that make an interstate bus operator less safe in the normal operation of the defendant's business.

3. That the normal operation of the defendant's business requires that a beginning interstate bus operator serve from 10 to 20 years on the "extra board" which service requires the highest degree of physical ability and use of the senses.

4. That its experience of over 40 years proves that an interstate bus driver is most safe after acquiring 16 years of interstate bus driving experience which experience could not be acquired by newly-employed drivers up to the age of 65 years.

Through the centuries volumes have been written on the subject of aging. It is a process that intrigues not only the scientific and philosophic mind but the less learned one as well. Aging is a phenomenon in which all humanity shares. The volumes that have been written are doubtless merely a fraction of what is yet to be studied. There will be inquiry and research as long as man exists for there will be the fascination with himself that leads to such study. For the moment, however, I must rely for my decision on that which exists in the realm of learning and on what I believe is both justiciable and correct under the existing law.

Defendant's policy of not considering applicants over the age of 35 has been in effect since approximately 1929. This is true regardless of an applicant's prior experience. At least two of defendant's officers, Mr. Forman and Mr. Gocke testified that they did not know why age 35 was originally selected nor why other ages were not selected. However, they and defendant's other witnesses vigorously support the age limitation policy and maintain that since the policy has produced results from a safety standpoint it has never been deemed necessary to change the rule. The National Association of Motor Bus Owners (hereinafter referred to as NAMBO) was granted leave to

participate as *amicus curiae* for the plaintiff. In its trial brief it stated the issue at bar succinctly:

> It is submitted that the essence of the motor carriage of passengers is safety and that if the employment of drivers over age 35 would undermine that safety, the maximum age standard utilized by defendant is "reasonably necessary" within the meaning of the *bona fide* occupational qualification exception to the Act.

Thus, the battle lines have been drawn. The plaintiff contends that the Age Discrimination in Employment Act of 1967 was enacted for the express purpose of "promoting employment of older persons based on their ability rather than age" and prohibiting "arbitrary age discrimination." *Hodgson* v. *First Federal Savings and Loan Ass'n. of Broward County, Fla.*, 455 F. 2d 818, 820 (5th Cir. 1972). The defendant contends that it has established a "valid justification" for its hiring practices. *Hodgson* v. *First Federal, supra,* pg. 822.

> In discrimination cases the law with respect to burden of proof is well-settled. The plaintiff is required only to make out a prima facie case of unlawful discrimination at which point the burden shifts to the defendant to justify the existence of any disparities. See e.g., *Noris* v. *Alabama,* 294 U.S. 587, 55 S. Ct. 579, 79 L.Ed. 1074(1935); *Muniz* v. *Beto,* 434 F. 2d 697 (CA5,1970); *Weeks* v. *Southern Bell Telephone and Telegraph Company,* 408 F. 2d 228 (CA5, 1969); *Gates* v. *Georgia-Pacific Corporation,* 326 F. Supp. 397 (D.C.D.Or.1970). Once the plaintiff has made out his prima facie case we look to the defendant for an explanation since he is in a position to know whether he failed to hire a person for reasons which would exonerate him. *Hodgson* v. *First Fed. Sav. & L. Ass'n., supra,* pg. 822.

I find that the plaintiff has made a *prima facie* case of refusal by the defendant to hire on the basis of age.

Thus, it is incumbent upon me to carefully examine defendant's position and each of its contentions in order to arrive at a decision as to whether or not the defendant's reasons do indeed 'exonerate' it.

Defendant, Greyhound Lines, Inc. is the nation's largest inter city bus carrier with 105,000 route miles within the continental United States. The defendant employs approximately 9,500 bus drivers all of whom must meet certain requirements that are set by the defendant in accordance with Federal Regulations, State Statutes and the defendant's own policies. The above mentioned requirements relate to an individual's character, age (minimum age is 24, maximum is 35), height, weight, education, health, driver training school and probationary period.

The purpose of the health examination is to detect the presence of any physical or mental defect that would affect the applicant's ability safely to operate a motor vehicle. Included in the instructions from the Department of Transportation and the defendant that the examining physicians receive is the following:

> The examining physician should be aware of the vigorous physical demands and mental and emotional responsibilities placed on the driver of a commercial motor vehicle. In the interest of public safety the examining physician is required to certify that the driver does not have any physical, mental, or organic defect of such a nature as to affect the driver's ability to operate safely a commercial motor vehicle. * * * History of certain defects may be cause for rejection or indicate the need for making certain laboratory tests or a further, and more stringent, examination. * * * (Pltf. ex. 6 pg. 1; pltf. ex. 7).

It is axiomatic that common carriers are held to an extremely high degree of care. Thus, it is the defendant's obligation to exercise the highest degree of

care possible in all aspects of its business including, of course, the hiring of bus drivers.

When successfully completed the aforementioned qualifications and requirements merely constitute an entry into defendant's organization. Greyhound bus drivers must continue to meet standards set by the defendant in accordance with Federal Regulations. Those standards include a low accident rate, safe driving habits, good health, good driver attitude and courtesy to customers (Pltf. ex. 1 req. 27). Each driver's reaction time is checked periodically as is his driving ability under all weather conditions. A physical examination is required by Federal Regulations at two-year intervals up to age 50 and annually thereafter until age 65. (Pltf. ex.'s. 1 and 2 req. 28).

Thus, it may be seen, a fortiori, that defendant does exercise a high degree of care in the hiring of its bus drivers.

Defendant's next contention is that the required physical examination "is incapable of discovering those physical and sensory changes common to all men" that would cause an interstate bus driver to be less safe while in the operation of defendant's business. This premise is not as easily dealt with as was defendant's first contention. The expert testimony tendered at trial and in exhibits differs greatly and so I feel constrained to review certain portions of that material.

Defendant's witness, Dr. Harold Brandaleone, a physician specializing in internal medicine and a medical consultant to bus and trucking companies, testified that he did not believe a man past 40 should be employed in a new job of driving an inter city bus (tr. 352). Dr. Brandaleone testified that in general after a certain age, usually about 40, degenerative changes occur in the individual such as arteriosclerot-

ic changes in the blood vessels, the heart, the blood vessels in the brain, the kidneys, the lungs, his lower extremities and his visual capacity or sensory changes including a decrease in his ability to see at night (tr. 351; 318). In response to question concerning physical examinations Dr. Brandaleone testified as follows:

> Well, physical examination can find many of them but there are many things that cannot be detected by physical examination, or even those that may be detected at a periodic examination that could occur every year or every two years in the interim, and this is the thing that concerns me.
>
> An individual, as he becomes older, can develop any one of these disabilities or infirmities that would make him an unsafe driver, and unless he had been having a physical examination to have these things detected, they would go undetected. (tr. 340).

Further in the testimony the witness testified that the undetectable effects of aging in persons over age 40 are equally as likely to occur in defendant's present bus drivers over age 40 yet he did not consider them unsafe nor did he recommend that defendant retire its drivers at age 40. (tr. 384; 394).

Plaintiff's witness, Dr. Abraham J. Mirkin, a physician and surgeon and the first president of the American Association of Automotive Medicine, testified that defendant's policy of excluding bus driver applicants solely due to chronological age is not based on medical statistics or medical facts since chronological age is not of itself a measurement of an individual's physiological capabilities nor an impairing factor in the ability to drive safely. (tr. 739–40; 749–52; 759; 760). Dr. Mirkin stated the following in relation to physical examinations.

> * * * I feel that although a physical examination for a driver candidate is an impor-

tant part of the screening process, it is by no means the only factor nor, in my judgment, the most important factor, in determining whether a driver will be good or will not be good.

I think a physical examination such as DOT gives or such as the average good internist gives, will screen out certain coarse and gross physical and pathological states and that is all; it will not of itself determine whether an individual is going to be a good driver.

But all the other things we have to do, investigate the background of an individual, his relationship to police, his relationship to the motor vehicle administrator's office, his relationship to the welfare department, his relationship to Alcoholics Anonymous, his relationship to his indebtedness and his financial control, all of these factors— (tr. 760–61).

Professor Ross A. McFarland, Ph. D., a physiological psychologist and specialist in the field of aging was tendered as a witness by the plaintiff. Dr. McFarland testified that chronological age is not a reliable index of a person's physical or psychological condition and cannot be a basis to determine the ability of a person to drive. (tr. 1832; 1834; 1854). He emphasized that chronological age is not an accurate index of a person's physical condition, (tr. 1816; 1819), and stated that many physiological and emotional alterations which result from the aging process are not necessarily a cause for driver limitation or impairment. (tr. 1834).

Dr. McFarland testified as follows:

* * * I think the Greyhound data would show very little evidence that accidents have occurred because of physical defects. I think their medical screening is good and that they would pick up the physically ill or the markedly physically defective person, that would come out.

> There is very little evidence that medical conditions cause many accidents in public transportation. In fact, there are very few—there is less evidence that heart disease and advanced illness cause automobile accidents. I have had two physician friends die recently and they have drawn up to the side of the road. They have become aware of their illness and they are not apt to have the sudden and acute heart failure while driving.
>
> This rarely, if ever, occurs in the bus or truck industry—(tr. 1836).

Later in the trial in response to cross-examination, Dr. McFarland stated the following:

> * * * I am saying that the physical examinations are poor and do not test functional ability, and I want a man judged on the basis of his functional ability, his capacity to do the work, and whenever you employ a man, you immediately put him through all of the functional tests of driving. (tr. 1914).

In an article [1] Dr. McFarland wrote:

> Research has not yet furnished definitive answers to many questions of minimal physical standards for driving and of medical fitness to drive safely. There is great diversity in the requirements of the various states in this connection and in the prevailing professional opinions and practices. Thus far there have only been a few objective studies to establish cut-off points on an experimental basis, and to provide criteria to aid in advising persons with certain physical conditions or the safety of driving. pg. 78.

On page 75 of the same article the author made the following statement:

> The role of the medical profession is appraising fitness to drive an automobile has been

[1] *Psychological and Behavioral Aspects of Automobile Accidents*, Reprinted from Traffic Safety Research Review, Volume 12, Number 3, pages 71–80, September 1968.

> based on clinical judgment and experience, rather than on experimental data involving the application of broader principles.
>
> * * * The use of clinical judgment may be effective in extreme cases, but limited information has been developed for minimum standards relating to physical and mental fitness. Furthermore, until very recently, no empirical findings have been reported which indicate that persons suffering from any disease, with the exception of alcoholism, have higher accident rates than persons free from disease.

Dr. McFarland goes on to write of a series of studies begun in 1963 in California in which accident rates per mile were compared for drivers known to the California Department of Motor Vehicles to have medical defects and drivers known not to have medical defects. The drivers with organic medical conditions fell into three categories; those with epilepsy, diabetes and cardio-vascular diseases. However, I should like to note that a thorough medical examination including the use of an electroencephalograph, an electrocardiogram and other diagnostic tests would immediately make any of these illnesses apparent.

Thus, having read and listened to the various witnesses and drawn upon my own experience and knowledge I find one common thread throughout; there is no agreement as to the reliability or the proper weight that ought be placed on physical examinations. I find, that a physical examination is no more valid a test of driving ability for a 25 year old than for a 45 year old. Therefore, I cannot utilize defendant's second reason as a criterion for deciding that a man of 25 would, merely by virtue of being 25, be a safer driver than the man of 45. I cannot state with definitive certainty that such physical examinations as are given would be capable or incapable of discovering the physical and sensory changes common to all men nor that those

changes are necessarily caused only by the aging process nor that such changes in and of themselves make an interstate bus operator less safe in the normal operation of defendant's business.

The third argument tendered by defendant in defense of its policy concerns itself with the "extra board" system. Within Greyhound's organization there are two general classifications of drivers; those who perform 'regular runs' and those who perform 'extra board'. A regular run is one which is performed regularly and is a scheduled service between two given points. On the other hand, 'extra board' runs vary and are performed on the basis of passenger demand and consist of special operations, tours, charters and extra sections of regular runs if there is a call for more than one bus on a regular run. Extra board drivers do not have scheduled routes and work off of the board on a first in, first out basis. On the average an extra board driver is called to perform about four driving runs in a seven day period. (pltf. ex. 29, pp. 43, 55).

Extra board work and regular runs are assigned on the basis of seniority. A driver may go from a regular run to the extra board and back to a regular run (tr. 1176–77) or if he has the necessary seniority, a driver may select a regular run in the winter months which are not as busy as the summer months and then work the extra board in the summer in order to make more money. (tr. 1417–19; 1433).

Neither regular run drivers nor extra board drivers are permitted to drive more than ten hours and cannot be on duty, including driving, for more than fifteen hours, without at least eight consecutive hours off. (pltf. ex. 29, pp. 33–4; Fed. Reg. pltf. ex. 4, 5A, 5B).

It is defendant's strong contention that the rigors of the extra board are such as to necessitate the imposition of an age limitation. Defendant asserts that persons between the ages of 40 and 65 simply do not have the stamina for the irregular work schedule of the extra board. Five of defendant's drivers appeared as witnesses and each testified that being an extra board driver is demanding and physically exhausting work.

However, after listening to the testimony concerning extra board vis a vis regular run driving, I am not convinced that the irregular hours and possible adverse driving conditions are any more difficult for those applicants over 40 years of age than for those under 40. I cannot accede to a contention which flatly states that all applicants over 40 are inflexible, unadaptable and untrainable and, in effect, that is what I am called upon to do. The defendant has not tendered the necessary statistical evidence to allow for such a finding. The defendant's policy is not based on personal experience or observations of new applicants age 40 or over.

> Speculation cannot supply the place of proof. *Galloway* v. *U.S.*, 319 U.S. 372, 395; *Moore* v. *Chesapeake Ry. Co.*, 340 U.S. 573, 578.

In *Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F. 2d 228, 235 (5th Cir. 1969), plaintiff's application for the position of switchman was refused consideration solely because of her sex. The court held in refusing to accept defendant's contention that the job was too strenuous for women:

> We conclude that the principle of nondiscrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or

substantially all women would be unable to perform safely and efficiently the duties of the job involved.

The question thus arises as to whether or not Greyhound has established a "factual basis" for its belief that applicants between the ages of 40 and 65 would be unable to perform safely the duties of an extra board driver. I find it has not established such a basis. It is true as the plaintiff has asserted that "the defendant is in a position to obtain the pertinent objective data simply by comparing the accident records of its extra board drivers who are over 39 years of age with the accident records of its extra board drivers who are under that age." (pltf. post tr. brief, pg. 34). Nor has the defendant compared the relationship between age and applicant failures at the training stages. (tr. 491). It is also true as plaintiff states that the defendant instead combined its statistics for extra board drivers and regular run drivers. These statistics actually show that its drivers over age 40 have a better safety record than those under 40. (deft. exs. 7, 8). Thus it may be assumed that the better safety record of Greyhound drivers over age 40 applies to those on the extra board as well as to those on the regular runs.

There is no requirement that older drivers may not bid for extra board work (tr. 546) and there are drivers, as in Indianapolis, Indiana who after 20 years on the extra board still do not hold regular runs. (tr. 1283–4). Plaintiff submits and I agree that such practices belie any claim that the extra board work is so 'rigorous' that a 40 year old age limit is necessary.

Defendant's fourth argument for continuation of its policy is that an interstate bus driver is most safe after acquiring 16 years of interstate bus driving experience and such experience could not be acquired by newly-employed drivers between age 40 and 65.

Numerous charts tendered by the defendant as evidence purported to show statistics which would support defendant's contention. For instance, during 1968–71 drivers between the ages of 24–40 had the highest number of accidents per driver, whereas drivers 41–60 had about the same low accident experience (the drivers between 56–60 showed a slight increase in accidents over the safest age group of 51–55 but substantially below the age group 24–40). Defendant also purported to show that during the same period drivers with up to 5 years' experience had higher accident rates than those with more than 5 years' experience. Defendant asserted that the safest period for drivers occurs from 11 to 25 years after initial employment and that this safe period would be lost if applicants were hired after age 40. (Deft. exs. 7, 8).

Dr. John Eberhardt, a research psychologist with the National Highway Traffic Safety Administration, United States Department of Transportation, stated that he had tested the significance of the points on defendant's exhibits 7 and 8 and had found that the alleged "upswings" for the age group 56–60 and for the group with 26–30 years of experience were not significantly different from chance and were insignificant. (tr. 1754–55).

It is most important to note that exhibits 7 and 8 do not take into consideration the number of miles driven by drivers in each age group. (tr. 624). Defendant has stated that older drivers usually hold regular runs. Defendant's exhibit 5 is a chart showing that the average regular run driver drives more than twice as many miles monthly than does the average extra board driver. Since there is no way to know how many miles were driven per driver in each age and experience group in defendant's exhibits 7 and 8 it is not possible to duly compare accidents per mile driven

in relation to the age of the driver. In other words, the question is unanswered as to whether a person over age 40 is less safe than one under 40 per mile driven.

One might even conjecture that it is not the fact of experience so much as the maturity of the individual that allows for the safety record of those with 11–25 years of experience. Defendant has admitted that certain causes of accidents, such as emotional immaturity and lack of stability are found more frequently in those under age 35. (tr. 1187). However, we are not in the realm of conjecture and I find that defendant has not satisfactorily proved that the safety record of those drivers with 16 years of interstate bus driving experience is due to the fact that these individuals were hired before reaching the age of 40.

Nor has defendant impressed me with a cogent reason for its refusal to hire drivers over the age of 40 even though those drivers have had other interstate bus driving experience including driving extra board runs for other companies. Defendant contends that applicants over the age of 40 cannot be "untrained" if they have had prior experience and that

> it has been our experience that it is easier to take someone who has never driven a large vehicle and teach him to drive it than to take someone who has learned to drive a large vehicle some place else and then teach him to drive the way we want and expect him to drive our large vehicle. (tr. 645).

Yet, all five of defendant's driver-witnesses had previous commercial driving experience driving buses or large trucks before being employed by Greyhound. (tr. 1290–1; 1296–1300; 1342; 1385; 1440).

It is, I believe, inconsistent to maintain that those who have driven large vehicles and are under age 40 are able to be "untrained" whereas those over age 40 cannot be "untrained". Defendant has offered no evi-

dence that would satisfactorily prove such a contention.

Unable to find merit in defendant's four arguments for its age limitation policy, I should, at this juncture, like to mention a number of other factors, that I have also borne in mind in reaching my final decision.

During certain peak periods the defendant leases equipment and drivers from other bus companies and during those periods the drivers become part of defendant's operations. Such drivers, however, are not subjected to defendant's screening process and they are permitted to drive regardless of the age at which they were hired. (Pltf. ex. 29, pp. 55–9; tr. 1475). However, if any of these drivers over age 40 were to seek permanent employment with the defendant they would not be considered due to the age limitation policy for hiring.

Defendant, in addition to the above mentioned leasing arrangements, operates regular through service in which its buses travel through territory in which it has no operational authority. In other words, although Greyhound passengers start and end their trip with a Greyhound driver another driver (not one employed by Greyhound) will drive that part of the journey through the territory in which Greyhound does not have operational authority. Once again, defendant does not screen these drivers nor is it aware of whether or not they were hired prior to age 40. (tr. 1471–5; 1127–8; 1185).

Defendant employs certain seasonal drivers known within the industry as "school teacher drivers" who are generally teachers on vacation and are only employed during defendant's peak seasons. Each year defendant recalls and rehires these drivers as new employees up to age 50. Thus, it may be seen that defendant's age limitation policy is not applied although

these drivers must meet all the qualifications required of other drivers.

It should be noted that since 1928 when defendant's policy was formulated, there have been a great many changes within and without the motor bus industry that have had great impact on that industry. There has been a significant improvement in the technology of motor buses. For instance, all buses are diesel powered today and far easier to manipulate than in 1928. The roads of this nation are vastly improved over conditions of forty-five years ago. The safety practices and programs and in-depth training by interstate bus companies are far more sophisticated than in 1928. I have placed great weight upon the fact that defendant's officers admitted that they do not know why age 35 was originally chosen as a cutoff date for hiring new bus drivers; defendant has admitted that the age limitation policy was not based upon any "surveys, inquiries, research studies, statistical studies or any other study to our knowledge." (tr. 564–5).

The following exchange between counsel for plaintiff and Mr. Forman, an officer of defendant, serves to buttress my decision that the defendant's policy is not founded on the "factual basis" for its belief that "all or substantially all (members of the protected class) would be unable to perform safely and efficiently the duties of the job involved" that is required under *Weeks, supra,* pg. 235.

> Q. Is that right, you have in fact no personal experience in initially employing anyone 40 or over as a Greyhound driver?
>
> A. That is correct.
>
> Q. Then you in fact cannot state, based on your own personal knowledge, that the consideration in employment of otherwise qualified individuals 40 or over for initial employment as a bus driver with Greyhound would adversely affect safety, isn't that right?

> A. You have to take into consideration the problem of the extra board; the rigors that it demands and what this man's life style will be at that time. Good basic common sense tells us that to begin his career as a Greyhound bus driver over age 40, go through the portion of his apprenticeship, when he has the highest number of accidents, and about the time he is getting to his stride the aging process catches up with him and he is right back into the upswing again without having a flattening out. (tr.1195–6).

I must disagree. "Good basic common sense" does not suffice as "objective data" to satisfy the "factual basis" of the *Weeks* decision. Nor has defendant had any experience with applicants above age 40 so that it could factually state that such drivers would have the highest number of accidents during their apprenticeship.

Defendant need not hire all applicants; the rigid requirements and qualifications now in effect for those applicants under age 40 will continue to be in effect.

Employers are required to "consider" individuals on the basis of what they can contribute, not on the basis of chronological age (113 Cong. Daily Rec. 34744). If ever there were an opportunity for "individual consideration" surely this one for through its screening process defendant has ample opportunity to exclude those individuals it finds unsuitable for interstate bus driving.

Safety is the foremost concern involved herein not only for defendant but for plaintiff and this Court as well, but I cannot accept the contention that persons over 40 cannot become safe bus drivers. I believe strongly that functional capacity and not chronological age ought be the most important factor as to whether or not an individual can do a job safely. This determination must be made repeatedly throughout the

employee's employment experience. The human variances involved are myriad; there is no way to generalize as to the physical capability and physiological makeup of an individual. Nor is there a way to project how an individual will be affected by the aging process.

I thereby conclude that the data prepared by the defendant and the evidence it has presented has not met the burden of demonstrating that its policy of age limitation is reasonably necessary to the normal and safe operation of its business nor that age is a bona fide occupational qualification within the meaning of the Act. Therefore, it is adjudged, ordered and decreed that judgment for the plaintiff and against the defendant be and the same hereby is entered.

Enter:

JAMES B. PARSONS,
United States District Judge.

Dated: February 5, 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1974